HE SUPREME COURT OF THE UNITED STATES.

TELLURIDE POWER TRANSMISSION COMPANY AND L. L. NUNN, PLAINTIFFS IN ERROR.

VS.

E RIO GRANDE WESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

Plaintiffs in error reply in the order of the Brief of De-lant in Error to the specific points italicized and con-ed in the argument.

"I.

CONCERNING THE DEFENDANT'S CLAIM OF TITLE.

(A.)"

Defendant in Error, contends, page 9:

"So far as it related to the defendants' claim of owner-, the decree of the court below did not involve the con-ction of any federal statute or the determination of ts of the defendants acquired pursuant to a federal ute. It was based upon a fact found and is not now n for review."

Plaintiffs in error take issue with that proposition and wer that the reverse is the case, to-wit:

The decree of the court below did involve the construction of a federal statute and the determination of rights of the defendants acquired pursuant to a federal statute. Upon the facts as found the law is open to review and correctly rendered entitles the plaintiff in error, defendants below to the possession of the laand in question.

The federal question is this: The inquiry into the validity of the right of defendant Nunn to build a reservoir in Provo Canyon upon the public domain. It is a right given by section 2339 of the Revised Statutes. The right constitutes an "authority under the Statutes of the United States" which is "drawn in question" by this decision. This right does not depend upon the facts merely. I fully recognize all that is said in the brief that the court will not review decisions of fact or make new findings of fact; but taking the facts as found by the trial court and adopted by the Supreme Court plaintiffs in error have a right as matter of law to construct this reservoir for water upon the public domain and their rights being denied raises a federal question. Their right is denied as a matter of law not of fact, as in the case of Bushnell vs Crooks Mining Co., 148 U. S., which turned solely on an issue of fact. When the right is denied on a law point we have the right to review the decisions by which the court below arrived at the conclusion that the defendant in error was entitled to the premises.

This right and authority is fully alleged in the answer of the defendant and it is there "specially set up and claimed". (See Record page 7 Folo. 16 and Brief in Reply to Motion to Dismiss page 2). It was not necessary to quote the language of the statute or refer to the section under which we claim. The claim of the plaintiffs in error falls under both the first and third subdivision of section 709, the Statute being as follows:

Section 709: "Final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had—

(1.) Where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity. * * *

(3.) "Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority may be re-examined and reversed or affirmed in the Supreme Court upon a Writ of Error."

And the following language from the decisions of this court establishes fully that our claim is set forth with sufficient precision.

Bridge Proprietors vs. Hoboken Company, 1 Wall. 142 and 143.

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case'".

"Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress, or part of the Constitution supposed to be infringed by the state law, ought to be pointed out,

it has never been held that this should be done in express words. But the true andrational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Oxley Stave Company vs. Butler County, 166 U. S. 657-659.

"If there has been any modification of the views expressed in the two cases just cited, it has been only in the particular that it is not always necessary to refer to the precise words or to the particular section of the Constitution, under which some right, title, privilege or immunity is claimed, and that it is sufficient if it appears affirmatively from the record that a right, title, privilege or immunity is specially set up or claimed under that instrument or under the authority of the United States."

"In Bridge Proprietors vs. Hoboken Co., the court said that the true and rational rule was that, 'the court must be able to see clearly from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error and that the right thus claimed by him was denied.' It was held in that case that as the record showed that the State Court had upheld a statute of New Jersey whose validity had been questioned as impairing the obligation of a contract, and that as, under the pleadings, it could not have made the final judgment complained of without sustaining the validity of that act, this court had jurisdiction to re-examine that judgment."

Water Power Co. vs. Street Railway Co., 172 U. S. 485.

"While no special mention is made in the complaint of the Constitution of the United States, the whole theory of the plaintiff's case taken in connection with the answer is that the rights which it acquired to the five hundred horse

> power in question under the act of 1887 were impaired by the subsequent act of December 24th, 1892, ratifying and approving the contract of the board of directors of the state penitentiary with the defendant."

The trial court and the Supreme Court of Utah both incorrectly construed the Statute of the United States above referred to, in this: That it did not sufficiently fully recognize the right of the prior appropriator. The court found acts which in themselves as a matter of law constituted such possession as would give the plaintiffs in error the right to the premises, but the court applied the law to it that they were not sufficient to constitute possession. The acts of possession are referred to in the principal brief and are in findings 16, 15, 17, etc. The conclusion from these findings should have been that the plaintiffs in error had taken the proper steps to entitle them to occupy the premises during the period of building the reservoir.

The expression in the statute, section 2339 "by prior possession" requires a construction. The plaintiff in error claimed the right to possession not only when actually being utilized, but during the period of reasonable time, with due diligence to prepare and get ready to use. The denial of this as a matter of law raises all the questions involved and discussed in this case.

"(B)."

Defendant in error contends page 13:

"The posting of notices, running of contour lines, and other things done by the defendants in Provo Canyon, did not constitute the exercise of any authority under section 2339 R. S. U. S. (Supra.)"

Plaintiffs in error claim that directly the reverse is true

and that the "not" should have been omitted and the sentence read as follows:

The posting of notices, running of contour lines, and other things done by the defendants in Provo Canyon, DID *constitute the exercise of an authority under Section 2339 R. S. U. S. (supra.)*

No notice was required by the statute. The United States statute required none. There is no state statute requiring any. The notice could only show the intention of the party. A notice written on every stake of the contour lines was notice of intention. "Water Level Provo Canyon Reservoir" written on every stake and the stakes placed where every man must see them that went up and down the canyon. The stake at Hanging Rock had an additional notice "Top of 85 foot dam." These notices were sufficient to show the intent; it was the actual taking of possession. It is immaterial whether plaintiffs in error made at some other time examination of other parts of the canyon with a view of ascertaining the best place to build their reservoir. They did not try to build and they did not assume to take possession of any other place than this one at Hanging Rock. The notices that were posted at different places other than at Hanging Rock were simply with a view of seeing whether Mr. Nunn desired to build at those places and in every case except at Hanging Rock and Middle Rock were subsequently abandoned. The first notice in 1894 put up by Holbrook at Bridal Veil Fall was his opinion as to the proper place to put the dam, but the very next year that place was abandoned. The notice was placed higher up, it was not the most advantageous place in the river. The notice at Middle Rock where the little 15 foot dam was placed. was and was only, for the purpose of building a temporary dam. The temporary dam was simply to assist the large one. The carrying out of the work of

the building the temporary dam was a part of the work in building the large one. It was the intention to use the power thus created for the purpose of building the large dam. The notice at the 85 foot dam was established before any attempt of the defendant in error to select these particular lands for their railroad and has never been abandoned. The effort in the trial court and in the brief of defendant in error to compel the plaintiff to go Deer Creek was simply this. Deer Creek was five miles above. The plaintiffs in error did not have a prior right of possession to those premises. It was occupied by farmers and other people. The railroad seeks to compel plaintiffs in error to leave the premises that they had a right to, by pretending that the site is far better in other premises that they had no right to. The railroad was prior to the plaintiffs in error at Deer Creek, but subsequent at Hanging Rock. It is no answer to our right to build a reservoir and power dam at Hanging Rock, that we could build one cheaper at Deer Creek. We have not selected Deer Creek, we have selected Hanging Rock.

The statute is indeed intended to assist all manner of business, not only irrigation but milling of all kinds, electric power and every other form of use to which water power may be put. It gives a right of possession when the water is used also *Ex Necessati* for a proper period to make the improvements necessary to use the water. When the farmer who only has plowed a furrow with which to irrigate his land *begins*, his right is just as great as when completed. When the manufacturer that needs a reservoir that takes two or three years to construct *begins* to build, his right to the possession is just as great and is a possession just as much as if he had completed the reservoir. The right to use implies the right to prepare to use. The judgment of the court below seems to proceed upon

the theory that plaintiffs in error could not be in possession until the water was actually dammed back and was actually flowing into flumes and driving machinery to create electric power. But the right to the possession is the same from the moment work begins until it closes, provided that the work proceeds with reasonable diligence. This work began in 1895. Nunn had expended over $70,000 (see Record page 286, folio 401, also Record page 317, folio 417) in this enterprise. His entire work was directed and adapted towards creating this great power which he had in contemplation. To say that he was not in possession when he was there conducting that work is as absurd as to say that a farmer who has fenced his land and built a house upon it is not in possession because perchance his entire farm is not growing grain. The court erred in this application of the law in this very particular, to-wit: As to the right to occupy the canyon while plaintiffs in error were diligently prosecuting their work.

"(C.)"

Defendant in error contends, page 16:

"Appropriations of water and land to be warranted by Sec. 2339 R. S. U. S., must be kept within reasonable limits. They must not be such as to give an individual a monopoly, to the detriment of other interests, public and private. The defendants are claiming such a monopoly."

To that we reply:

That the appropriation of the water contemplated by Nunn is reasonable, proper, within reasonable limits and would not create a monopoly any more than any other appropriation of water by any person.

The testimony of Mr. Nunn showed that he had places where he could utilize all the power which an 85 foot dam

would furnish. He was within a few miles of Park City where an immense amount of mining was being carried on sufficient to use all the power he could create. He was also within a reasonable distance of the mining camps of Mercur, Tintic and Bingham, immense camps. Any one of these camps could utilize the entire amount of power which he was preparing to be enabled to transmit. He had the right to prepare to sell his power in the same way that a company may be organized to build an irrigating ditch and sell the water as in the case of Bear Lake and River, etc., Co. vs. Garland, 164 U. S. It was not necessary that Nunn should be the owner of the mines to entitle him to sell the power. In the nature of things he could not be at once the mine owner and the vendor of the power. This power could be and since has been successfully transmitted for the distance required from this dam to each of these camps.

Under this head the court discoursed upon the injury that the plaintiffs in error might do the highways and other public interests. This Railroad Company is not the guardian of the highways of Utah County, where these lands were situate. It will be time enough to discuss the relative rights of plaintiffs in error and the public when the public is before the court. It will be time enough to discuss any other private interest than that of the railroad company when such private interest appears and asks for an injunction. The finding of the court below on this subject was not the finding of any fact in issue or involved in this case and such finding was a nullity. The court cannot find any fact except those which are alleged:

> "It is a cardinal rule in equity, as in all other pleadings, that the *allegata* and *probata* must agree, and that averments material to the case omitted from the pleadings cannot be supplied by the evidence."

Noonan vs. Numan, 76 Cal. 49.

Murdock vs. Clarke, 59 Cal. 683, and cases cited at page 693.

"A finding is useless and idle, unless the facts found are within the issues; and a judgment based upon such facts cannot be sustained."

Noonan vs. Numan, 76 Cal. 49.

Morenhout vs. Barron. 42 Cal. 605.

Green vs. Chandler, 54 Cal. 626.

Devoe vs. Devoe, 51 Cal. 543.

And when the decisions of this court have held that the finding of the trial court are binding they mean simply those findings which are within the issues and properly made.

The court cannot in this case "thwart other interests and enterprises of a public character". Whether the building of a dam more than 15 feet high was contrary to the "customs and conditions of the country" is a question of law. When the statute provides that the water may be taken according to "local customs, laws and decisions of the courts" its determination is one of law and not of fact. What that law is has been fully explained by this court in the cases cited.

Basy vs. Gallagher, 20 Wall.

Broder vs. Water Co., 101 U. S.

And the effect is that there is a common law of water appropriation in arid countries growing out of necessity for their uses which entitles any person to put the waters to any use, big or little, no limit on account of size, provided such use does not interfere with some prior appropriator. The uses to which the plaintiff in error proposed to put these waters could not or would not interfere with any irrigation below it. We repeat as we did in the main brief

that it is not necessary to determine whether we are entitled to an 85 foot dam or not, the court decides that we are not entitled to any dam over 15 feet at Middle Rock, and not to *any* dam at all at Hanging Rock. If the court simply held that we had the right, as we clearly had, to a dam, but that an 85 foot dam was excessive in height, and that he would limit us to a lower number, say 25 or any other feet, then the question would arise, and not till then, whether the plaintiff in error would have the right to build to the height of 85 feet. Our right is denied in toto to any dam at all, and it must not be determined simply upon our claim to build a dam to the entire height of 85 feet.

Defendant in error insists again under this head that we are asking for a monoply. It is no more a monopoly for one corporation to own an electric power, than it is for one man or corporation to own a grist mill power. There are many streams in the west, and every where else, which can only furnish power enough for one mill, and yet it would not be a monopoly for one person to take up such a power under this statute and use it. When a farmer finds a little creek in the mountains, just enough to irrigate his farm, and he takes out the entire waters of that stream to irrigate, he becomes the sole owner, and is not a monopolist nor would be these plaintiffs in error if they obtained the right to utilize the water of Provo Canyon. It is not true as asserted in this brief that the building of an 85 foot dam would prevent railroads from running up and down the canyon. It was admitted by the testimony that a railroad could be built anywhere along the sides of the canyon above the 85 foot dam, it would cost more that is all. Counsel again says that such an appropriation is an injustice to the community. I want to ask again this court to remember that counsel is not retained by the "community" and that the "community" is not before the court, only the

railroad, that already has a branch in every canyon running east in Utah, and when we talk about monopolies it would be well to look at the octopus which extends its arms in every direction and claims the sole right to build a railroad in every canyon of Utah. These plaintiffs in error do not deprive the whole community of the benefit of this water for they extend it. The plaintiffs in error are giving the benefit to every mining camp within a radius of seventy miles. The defendant in error proposed to have a monopoly of the railroads to prevent these plaintiffs in error from selling power to interfere with their coal lands and their sale of coal.

"II.

Concerning the Plaintiff's Ownership of the Land in Controversy.

(A.)

Defendant in error contends, page 18:

"The existence of the plaintiff as a corporation of the State of Utah, the extent of its powers, and its liability to the forfeiture of some or all of its corporate powers are questions wholly within the jurisdiction of the State and its courts, and are questions which the State alone can raise."

To that we reply:

The right of plaintiffs in error is denied because the use of the bottom of the canyon is said to belong to defendant in error. Its right to any franchise, or existence, or to build a railroad up the canyon is involved in this controversy to the extent that it interferes with the rights of the plaintiffs in error, and the federal question being already raised the court may inquire whether the plaintiff below had any foundation upon which to bring its action.

Defendant in error claims it under an act of Congress. It claims a right to build upon the public domain. It had not built, but it claims the right to enter for the purpose of building. That is a federal question. It is true that it is not a federal question that we may review, because the validity of the right was confirmed not denied. But when this defendant in error interposed the existence of its right, as a reason why it should recover, and why plaintiffs in error cannot build their reservoir, we may inquire whether they have conformed to the statutes giving them authority. It would be the same kind of a case as if two claimants to mining ground, and to a patent therefor, had a controversy in the State court, each claims a right under the statute, one is confirmed the other denied. The court will review such a case.

Jackson vs. Roby, 109 U. S.
Rose vs. Richmond, 114 U. S.
Shoshone Mining Co. vs. Rutter, 87 Federal 801.

On such review this court will examine the law as to which has the right to the premises in question, although necessarily the validity of the right of one has been affirmed, and the validity of the other denied. So here each party is claiming the right under a statute to enter upon the public domain, and to take exclusive use of this particular piece of land. The court will determine whether each party has complied with the statute. To illustrate, if the plaintiff below defendant in error had not filed with the Secretary of the Interior a copy of its Articles of Incorporation, and obtained a certificate that it was entitled to build upon the public domain, there clearly would be no case for the plaintiff below and any decision in its favor which denied the validity of our right could be reviewed here on that ground alone. So any claim of existence or

franchise or right to build may be examined into. The plaintiff below must show, first the franchise from the state to build, second compliance with the United States Statutes in projecting a railroad up this canyon. Before this plaintiff can prevail to defeat the validity of the right, this court must determine that the plaintiff below complied with the statutes, both national and local. We think that it is clear that it complied with neither as argued in the principal brief for the reasons therein stated. It must always be remembered that defendant in error was plaintiff below, and to entitle it to recover it must make out title to the particular lands in question. We attack its right to sue because it never had title, right or possession, possession or color of any of these. It never complied with any statute local or federal entitling it to build in Provo Canyon. We do not complain of any non-compliance of any condition, and we do not ask any forfeiture, or seek to set aside any grant that has been made, we simply say that this railroad company has not complied with the conditions precedent to its right to build, its right to build was limited to begin within two years, and complete within ten years, the statute was self acting.

As defendant in error was plaintiff below it must make out a case entitling it to the possession of public lands. It must be a possession prior to that of plaintiffs in error. The suit is founded on the possession. It is a bill in equity to quite title. Which is the prior possessor is a federal question so far as it depends upon the law. The plaintiff below was not qualified to become a prior possessor as against defendant until it was authorized by and had the franchise from the State. Whether it had such franchise and right from the State becomes therefore a part of a federal question involved; whether it had conformed to the

Statutes of the United States becomes a part of the Federal question involved.

In the complaint the plaintiff alleges that it is the owner and entitled to the possession of the specific three thousand feet long involved in this case. It claims the right to it both on the ground of an alleged possession prior to the defendants, and also on the ground of being the assignee of one A. N. Murphy, an occupant of the public domain. Such finding must conform to the law applicable. The claim as assignee of A. N. Murphy seems to have failed utterly. The claim as to the prior possession depends entirely upon the legal construction of what is meant by "prior possession" in the statutes and as to the legal construction of the franchises of the plaintiff, defendant in error, and the legal construction of the grant of congress to plaintiff, defendant in error, so that every part of the plaintiff's case becomes a part of a federal question.

(B.)

Defendant in error contends page 22:

"The plaintiff was entitled to construct and maintain a line of railway over the unsurveyed public land in question. The judgment of the court below sustaining this right, presents no federal question."

To that we reply:

It is a federal question whether the defendant in error has any right prior to the claims of the plaintiffs in error.

Wherever the court gives precedence to the defendant in error over the plaintiffs in error wrongfully and as a matter of law, then that decision on whatever ground based must necessarily raise a federal question. The court below decides that the defendant in error had a right of way for a railroad inconsistent with our reservoir, and therefore our right to a reservoir must be denied. We say the rail-

road had no right of way as a matter of law. The obsticle to the exercise of our rights is an illegal obsticle. It is a federal question for this court to say whether that obsticle is legal or illegal. We have discussed in the principal brief the points wherein the railroad company has not complied with the federal statute, and refer to that for further reply.

"III."

Defendant in error contends:

"There is no question before this court concerning any attempt of the defendants to remove the cause to the Circuit Court of the United States."

We reply:

That the trial court erroneously refused to remove the cause to the United States Court. This is a federal question and is reviewable here.

We admit, however, that this question was not presented to the Supreme Court of Utah and was not passed upon by it. The error was alleged to the action of the trial court, but that part of the record was not filed in the Supreme Court until after that decision and that tribunal did not act upon it and if that prevents this court from reexamining that question then there is nothing here for examination under that head. If the court will examine the action of the district court then for the reasons stated in the principal brief, that action was clearly erroneous. Whether this court will review the action of the district court when that action is not affirmed by the Supreme Court of the State we submit without argument.

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